A **TETUAN SRI LING & ASSOCIATES v. LIAN MENG WAH**

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
B [CIVIL APPEAL NO: W-03(IM)-1-01-2014]
10 NOVEMBER 2014

BANKRUPTCY: *Capacity of bankrupt – Meaning of 'injury to person' – Respondent an undischarged bankrupt – Respondent obtained judgment in default*
C *against appellant – Late filing of notice of appointment to assess damages – Senior Assistant Registrar allowed application to set aside judgment in default – Appeal to judge-in chambers – Whether respondent legally competent to prosecute appeal – Whether requirement of sanction from Director General of Insolvency necessary – Bankruptcy Act 1967, s. 38(1)(a)*

D ***CIVIL PROCEDURE:*** *Appeal – Notice of appeal – Appellant obtained judgment in default against respondent – Late filing of notice of appointment to assess damages – Senior Assistant Registrar allowed application to set aside judgment in default – Appeal to judge-in chambers – Failure to state decision appealed against*
E *in notice of appeal – Whether non-compliance occasioned miscarriage of justice or prejudiced appellant – Rules of Court 2012, Form 114*

In the High Court, Public Bank Bhd ('the second defendant') claimed for repayment of credit facilities from the respondent ('LMW') followed by foreclosure proceedings for the sale of land charged as security for the said
F credit facilities. Even though the market value of the land was RM470,000, LMW had to sell the land at the forced value of only RM180,000. LMW instituted legal proceedings against the second defendant alleging negligent misrepresentation in the redemption statement issued to LMW for the purpose of the foreclosure proceedings by the second defendant which resulted in LMW suffering loss of RM290,000. Subsequently, LMW filed
G a second action against the second defendant and its solicitors for alleged abuse of process and the bankruptcy proceedings against LMW and sought, *inter alia*, general, exemplary and/or aggravated damages and damages for conspiracy to abuse the process of court. The appellant failed to enter appearance and consequently, LMW obtained a judgment in default ('JID')
H against the appellant. This was followed with the late filing of the notice of appointment to assess damages ('encl. 48') almost three years later. The appellant, on the other hand and equally late, filed its application to set aside the said JID ('encl. 46B'). LMW, in turn, filed his application ('encl. 53') to strike out the application in encl. 46B. The Senior Assistant
I Registrar ('SAR') allowed the appellant's application in encl. 46B and dismissed LMW's applications in respect of encls. 48 and 53. LMW appealed to the judge-in-chambers and the appeal was allowed. Hence, the present appeal. The appellant raised two preliminary objections, namely,

(i) whether the requirement of sanction from the Director General of Insolvency ('DGI') was necessary; and (ii) whether the notice of appeal to the judge-in-chambers was defective and bad in law. Further issues that arose for the court's determination were (i) whether LMW, being an undischarged bankrupt, was legally competent to continue with this suit and to prosecute in the present appeal and his appeal before the High Court Judge ('HCJ'). A B

Held (allowing appeal; setting aside orders of High Court and affirming orders of SAR for encls. 46B, 48 and 53)
Per Idrus Harun JCA delivering the judgment of the court:

(1) By virtue of s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act'), LMW was incompetent to maintain this action without the previous sanction of the DGI. However, s. 38(1)(a) of the Act provides for an exception. Where a bankrupt maintains an action for damages in respect of an injury to his person, he is legally competent to do so and no sanction of the DGI would be required. The conclusion by the HCJ that there could be physical injury occasioned to LMW was incorrect and neither was it supported by LMW's statement of claim as it was not pleaded and accordingly, did not come within the ambit of the words 'injury to his person' in s. 38(1)(a) of the Act. LMW had breached s. 38(1)(a) of the Act and as such, he ought not to have proceeded with this action for want of sanction. (paras 11 & 27) C D E

(2) The notice of appeal did not state the decision in respect of which enclosure LMW was appealing against. Form 114 of the Rules of Court 2012 ('ROC') requires the appellant to state in full the order appealed against. LMW ought to have filed three separate notices of appeal as there were three application and the decisions of the SAR were in respect of these applications. However, the three decisions were inter-related to one another and even though LMW filed one single appeal, it must, without any doubt, be in respect of all three decisions. Therefore, the non-compliance did not occasion a substantial miscarriage of justice to or prejudice the appellant in any manner. (paras 31 & 32) F G

(3) Even though the present O. 18 of the ROC did not have provisions which correspond with O. 18 r. 5 of the Rules of the High Court 1980 ('RHC'), the present ROC was non-existent at the time the pleadings were served on the appellant and when the decision to set aside the said JID was made. Clearly, O. 18 r. 5 of the RHC applied at that material time. The writ of summons and the statement of claim, having been served during the court's vacation, were not properly executed and thus defective. Accordingly, the said JID was irregular. (para 35) H I

(4) Non-compliance with O. 18 r. 5 of the RHC was not a mere irregularity which could be waived or cured but as matter which prevents any further proceedings from being taken on the writ of summons and if taken, would have the effect of vitiating it. The appellant was entitled *ex debito justitiae* to have the said JID set aside. (paras 44 & 45)

(5) Under O. 37 of the ROC, LMW was required to apply to the Registrar for directions within one month from the date of judgment. By filing encl. 48 almost three years after the said JID, LMW failed to comply with the mandatory requirement under O. 37 r. 1(1) of the ROC. LMW also failed to comply with the mandatory requirement under O. 37 r. 1(3) of the ROC which required him to file the notice of appointment for assessment for damages within six months from the date of judgment. There was serious non-compliance with O. 37 of the ROC and LMW did not proffer any explanation on the non-compliance and the delay of three years. (paras 47, 48, 50 & 52)

(6) The application under encl. 53 to strike out encl. 46B to set aside the said JID was an abuse of the court process as the ROC and the RHC do not provide for an application to strike an application. LMW should have opposed the application in encl. 46B at the hearing. There was clearly no merit in the application and the same should be dismissed. (para 53)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, Public Bank Bhd ('defendan kedua') menuntut pembayaran semula kemudahan kredit daripada responden ('LMW') diikuti dengan prosiding lelongan bagi jualan tanah yang dipajak sebagai cagaran bagi kemudahan kredit tersebut. Walaupun nilai pasaran tanah tersebut adalah RM470,000, LMW terpaksa menjualnya pada nilai paksaan hanya pada RM180,000. LMW memulakan prosiding undang-undang terhadap defendan kedua mendakwa salah nyataan cuai dalam penyata penebusan yang dikeluarkan kepada LMW bagi tujuan prosiding lelongan oleh defendan kedua yang mana menyebabkan LMW mengalami kerugian berjumlah RM290,000. Seterusnya, LMW memfailkan tindakan kedua terhadap defendan kedua dan peguamcaranya atas dakwaan salah guna proses prosiding kebankrapan terhadap LMW dan menuntut, antara lain, ganti rugi am, teladan dan/atau teruk dan ganti rugi bagi konspirasi untuk menyalah guna proses mahkamah. Perayu gagal menghadirkan diri dan akibatnya, LMW berjaya mendapatkan penghakiman ingkar ('PI') terhadap perayu. Ini diikuti dengan kelewatan memfailkan notis pelantikan untuk taksiran ganti rugi ('lampiran 48') hampir tiga tahun kemudian. Perayu, sebaliknya dan juga lambat, memfailkan permohonannya untuk mengenepikan PI tersebut ('lampiran 46B'). LMW, memfailkan permohonannya ('lampiran 53') untuk membatalkan permohonan dalam lampiran 46B. Penolong Kanan Pendaftar ('PKP') membenarkan permohonan perayu dalam lampiran 46B dan

menolak permohonan LMW bagi lampiran 48 dan lampiran 53. LMW merayu kepada hakim dalam kamar dan rayuan tersebut dibenarkan. Oleh itu, rayuan ini. Perayu mambangkitkan dua bantahan awal, iaitu, (i) sama ada keperluan sanksi daripada Ketua Pengarah Insolvensi ('KPI') adalah perlu; dan (ii) sama ada notis rayuan kepada hakim dalam kamar dan tidak sah di bawah undang-undang. Isu-isu selanjutnya yang turut berbangkit untuk pertimbangan mahkamah adalah (i) sama ada LMW, sebagai seorang bankrap yang belum dilepaskan, kompeten di bawah undang-undang untuk meneruskan dengan guaman ini dan untuk mendakwa dalam rayuan ini serta juga rayuannya di hadapan Hakim Mahkamah Tinggi ('HMT').

Diputuskan (membenarkan rayuan; mengenepikan perintah-perintah Mahkamah Tinggi dan mengesahkan perintah-perintah PKP bagi lampiran-lampiran 46B, 48 dan 53)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Di bawah s. 38(1)(a) Akta Kebankrapan 1967 ('Akta'), LMW tidak kompeten untuk mengekalkan tindakan ini tanpa sanksi KPI terlebih dahulu. Walau bagaimanapun, s. 38(1)(a) Akta memperuntukkan pengecualian. Di mana seseorang bankrap meneruskan tindakan bagi ganti rugi berkenaan kecederaan peribadi, dia kompeten di bawah undang-undang untuk berbuat sedemikian dan sanksi KPI tidak diperlukan. Kesimpulan oleh HMT bahawa kecederaan fizikal boleh berlaku kepada LMW adalah salah dan tidak disokong oleh penyata tuntutan LMW kerana ia tidak diplidkan dan dengan itu, ia tidak terjumlah di bawah perkataan-perkataan kecederaan peribadi dalam s. 38(1)(a) Akta. LMW telah melanggar s. 38(1)(a) Akta dan oleh itu, dia tidak sewajarnya meneruskan dengan tindakan ini kerana ketiadaan kebenaran.

(2) Notis rayuan tidak menyatakan keputusan lampiran yang mana yang dirayu oleh LMW. Borang 114 Kaedah-Kaedah Mahkamah 2012 ('KKM') memerlukan perayu menyatakan dengan penuh perintah yang dirayu. LMW sepatutnya memfailkan tiga notis rayuan berasingan kerana terdapat tiga permohonan dan keputusan-keputusan PKP adalah bagi permohonan-permohonan ini. Walau bagaimanapun, ketiga-tiga keputusan tersebut adalah saling berkaitan dengan satu sama lain dan walaupun LMW memfailkan satu rayuan, sudah tentu, tanpa sebarang keraguan, berkenaan ketiga-tiga keputusan. Justeru ketidakpatuhan tersebut tidak menyebabkan ketidakadilan kepada atau memprejudiskan perayu dalam apa jua cara.

(3) Walaupun A. 18 KKM tidak mengandungi peruntukan yang selari dengan A. 18 k. 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), KKM kini tidak wujud lagi semasa pliding-pliding tersebut diserahkan kepada perayu dan apabila keputusan untuk mengenepikan PI diketepikan. Dengan jelasnya, A. 18 k. 5 KMT terguna pakai pada masa

material. Writ saman dan penyata tuntutan, setelah diserahkan semasa cuti mahkamah, tidak dilaksanakan secara teratur dan dengan itu, cacat. Oleh itu, PI tersebut adalah tidak teratur.

(4) Ketidakpatuhan A. 15 k. 5 KMT bukanlah sekadar ketidakaturan yang boleh diketepikan atau diperbetulkan tetapi ia adalah hal perkara yang menghalang prosiding lanjut daripada diambil ke atas writ saman dan sekiranya diambil, akan mempunyai kesan membatalkannya. Perayu berhak *ex debito justitiae* untuk mengenepikan PI tersebut.

(5) Di bawah A. 37 KKM, LMW perlu memohon kepada Pendaftar bagi arahan-arahan dalam satu bulan dari tarikh penghakiman. Dengan memfailkan lampiran 48 hampir tiga tahun selepas PI tersebut, LMW gagal untuk mematuhi keperluan wajib di bawah A. 37 k. (1) KKM yang memerlukannya memfailkan notis pelantikan bagi taksiran ganti rugi dalam masa enam bulan dari tarikh penghakiman. Terdapat ketidakpatuhan pada A. 37 KKM dan LMW tidak memberikan sebarang penjelasan bagi ketidakpatuhan dan kelewatan selama tiga tahun tersebut.

(6) Permohonan di bawah lampiran 53 untuk membatalkan lampiran 46B bagi mengenepikan PI adalah salah guna proses mahkamah kerana KKM dan KMT tidak memperuntukkan bagi permohonan untuk membatalkan permohonan. LMW sepatutnya membantah permohonan dalam lampiran 46B semasa perbicaraan. Jelas tidak terdapat merit dalam permohonan tersebut dan ia harus ditolak.

Case(s) referred to:

Aminah Abas v. Pentadbir Tanah Daerah Kuantan [2004] 5 CLJ 1 HC ***(refd)***

Anlaby v. Praetorius [1888] 20 QBD 764 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1978] 1 LNS 15 FC ***(refd)***

Craig v. Kanssen (1943) I KB 256 CA ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***

Hamp-Adams v. Hall (1911) 2 KB 942 ***(refd)***

K Ismail Ganey Rowther And Company v. M A Abdul Kader, The Official Assignee Of The Property Of K P Peer Mohamed, A Bankrupt [1932] 1 LNS 31 ***(refd)***

Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***

McLoughlin v. O'Brian and Others [1982] 2 All ER 298 ***(refd)***

Mohd Afsar Yunus v. Handal Utama Sdn Bhd [1995] 2 CLJ 118 HC ***(refd)***

Robert v. Owen [1980] 6 TLR 172 ***(refd)***

Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors [1992] 1 LNS 41 HC ***(refd)***

Sharifah Aini Syed Jaafar v. Karangkraf Sdn Bhd [1989] 2 CLJ 1269; [1989] 2 CLJ (Rep) 467 HC ***(refd)***

Stapeley v. Annets [1970] 1 WLR 70 CA ***(refd)***

Tong Soon Tiong & Ors v. FA Securities Sdn Bhd [2013] 2 CLJ 448 FC ***(refd)***

Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 FC ***(refd)***

Witech Sdn Bhd & Ors v. BHR Group Ltd [2010] 9 CLJ 288 CA ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 38(1)(a)
Rules of the High Court 1980, O. 12 r. 6, O. 18 r. 5
Rules of Court 2012, O. 2 r. 2(1), O. 18, O. 37 r. 1(1), O. 42 r. 13, O. 77 rr. 3(1), (3)

Other source(s) referred to:
Bullen and Leake and Jacob's Precedents of Pleadings, 12th edn, p 1203
Catherine Elliott & Frances Quinn, *Tort Law*, 5th edn, pp 38-39
Daniell's Chancery Practice, 8th edn, i, p 708

For the appellant - T Gunaseelan; M/s Gunaseelan & Assocs
For the respondent - In person

[Appeal from High Court, Kuala Lumpur; Suit No: S7-22-1159-2008]

Reported by Najib Tamby

JUDGMENT

Idrus Harun JCA:

Introduction

[1] This appeal arises from the decision of the learned judge in the court below delivered on 12 December 2013, allowing the first respondent's (LMW) appeal:

(a) To reinstate the judgment in default of appearance (the said judgment in default) obtained by LMW against the appellant (encl. 46B);

(b) To assess damages in respect of the said judgment in default (encl. 48); and

(c) To strike out the appellant's application to set aside the said judgment in default (encl. 53).

[2] LMW appeared in person in this appeal.

[3] The judgment of the learned judge dated 30 August 2014 deals with two matters. The first matter deals with the application by LMW to impeach the adjudication order and the receiving order (the AO and RO) dated 22 July 2013 in a bankruptcy proceeding in respect of Kuala Lumpur High Court Bankruptcy No: 29-5767-10-2012 and the decision of the Selayang Sessions Court on 23 February 2013 in Summons No: 51-18-2007. The second matter relates to LMW's notice of appeal to the judge-in-chambers in the instant action against the learned Senior Assistant Registrar's (SAR) decisions on encls. 46B, 48 and 53. This judgment will deal with the second matter of the judgment of the learned judge only.

A **Background Facts**

[4] The facts of the case that can be discerned from the judgment of the High Court and pleadings filed by both parties in this case reveal that LMW is an advocate and solicitor of the High Court of Malaya who at the material time worked with the appellant, a legal firm. On 24 December 2008, LMW B commenced the instant action by filing a writ of summons together with the statement of claim against the appellant as the fourth defendant, Tetuan Shook Lin & Bok as the first defendant, Public Bank Bhd as the second defendant and Abdul Razak Hashim, a partner of the appellant, as the third defendant. What emerges from the statement of claim reveals that prior to C the commencement of this action, the second defendant instituted legal proceedings against LMW for the repayment of credit facilities in the Klang Sessions Court *vide* Summons No: 52-847-2003 which was followed with foreclosure proceedings against LMW for the sale of land charged as security for the said credit facilities. As a result of these two actions by the second D defendant, LMW had to sell the land in a forced sale for only RM180,000 being the forced value. The market value of the land LMW alleged, was RM470,000.

[5] On 22 January 2007, LMW instituted legal proceedings against the second defendant *vide* Kuala Lumpur Sessions Court Summons No: S4-52- E 1959-2007 alleging negligent misrepresentation in the redemption statement issued to LMW for the purpose of the foreclosure proceedings by the second defendant which resulted in LMW suffering loss of RM290,000 when he was forced to sell the charged land for only RM180,000. Subsequently, LMW *vide* Kuala Lumpur High Court Civil Suit No: 22-202-2008, filed a second F action against the second defendant and its solicitors namely Messrs. Soo Thien Ming & Nashrah for alleged abuse of process in connection with Summons No: S4-52-1959-2007 and the bankruptcy proceedings filed against LMW by Messrs Soo Thien Ming & Nashrah on behalf of the second defendant. Following the second action by LMW, the second defendant G retained the first defendant as its solicitors.

[6] LMW commenced the present action in Kuala Lumpur High Court on 24 December 2008 in respect of which encls. 46B, 48 and 53 are the subject matters of the appeal before this court. LMW seeks the following reliefs:

H (a) General damages of RM250,000;

(b) Exemplary and/or aggravated damages of RM2.5 million;

(c) Damages for 'conspiracy to abuse the process of court' in the sum of RM2.5 million;

I (d) Interest of 8% on the damages to be assessed from 19 September 2008 until date of realisation;

(e) An order that the defendants pay damages to be assessed from 19 September 2008 until full settlement, cost of the action and cost of assessment of damages by the Deputy Registrar; and

(f) Any other and further relief which the court considers just and expedient.

[7] The appellant failed to enter appearance and consequently LMW obtained the said judgment in default against the appellant on 19 January 2010. This was followed subsequently with the late filing of the notice of appointment to assess damages (encl. 48) on 24 December 2012 almost three years later. The appellant on the other hand and equally late, filed its application to set aside the said judgment (encl. 46B) on 24 December 2012. LMW in turn filed his application (encl. 53) to strike out the application in encl. 46B.

[8] The three applications were heard before the learned SAR who on 18 April 2013 allowed the appellant's application in encl. 46B and dismissed LMW's applications in respect of encls. 48 and 53. Following LMW's appeal to the judge in chambers, the learned judge allowed his appeal in the terms mentioned above. Hence, the present appeal.

[9] We propose to deal first with the two preliminary issues raised by the appellant by way of preliminary objections here and in the court below, to be followed next with the appeal against the decisions of the learned judge in respect of encls. 46B, 48 and 53. These issues are:

(a) Whether the requirement of sanction from the Director General of Insolvency is necessary; and

(b) Whether the single notice of appeal to the judge-in-chambers dated 22 April 2013 is defective and bad in law.

Requirement Of Sanction

[10] The issue is whether LMW being an undischarged bankrupt is legally competent to continue with this suit, and thus to prosecute this appeal before this court and his appeal before the learned judge of the High Court. Perusal of the record of proceedings clearly shows that LMW was adjudicated bankrupt at the instance of the second respondent. The AO and RO were both made on 22 July 2013 obviously after LMW had commenced the action against the appellant and the learned SAR had made the above-mentioned orders on 18 April 2013 but prior to the hearing of LMW's appeal before the learned judge. LMW, despite his status under the law, continued with this action. It is to be noted that on 12 December 2013 the learned judge, following a letter dated 7 October 2013 from LMW applying to impeach the AO and RO and LMW's oral application and after hearing the same, set aside the AO and RO. On appeal, the Court of Appeal on 11 February 2014 set

aside the order made by the learned judge on 12 December 2013 and reinstated the AO and RO. Thus, LMW's status even at the time this appeal was heard remained an undischarged bankrupt.

[11] Being a bankrupt, learned counsel for the appellant argued, LMW by virtue of s. 38(1)(a) of the Bankruptcy Act 1967 (Act 360), was incompetent to maintain this action without the previous sanction of the Director General of Insolvency. However, s. 38(1)(a) of the Act 360 also provides for an exception. Where a bankrupt maintains an action for damages in respect of an injury to his person he is legally competent to do so and no sanction of the Director General of Insolvency is required. It is not in dispute that sanction from the Director General of Insolvency was not obtained by LMW. But the relevant issue before this court is whether LMW in continuing to maintain the present action is exempted from the requirement under s. 38(1)(a) of the Act 360 which requirement in our judgment, save for the exception therein, is clearly a mandatory one.

[12] The learned judge in her judgment ruled that as an undischarged bankrupt LMW had the legal competence to maintain this action and to prosecute his single notice of appeal against the appellant without the necessity to obtain the prior consent of the Director General of Insolvency. The decision is grounded upon the fact that LMW has sued the appellant for damages for injuries to his person based on the common law tort of abuse of legal process by virtue of the reliance by the first, second and third defendants on the allegedly false affidavit affirmed by the third defendant in which the third defendant had accused LMW of having committed breach of trust in his conveyancing practice. The learned judge went further by saying that the appellant's allegation that LMW had committed criminal breach of trust could expose LMW to being charged and sentenced to imprisonment and hence, there could be physical injury occasioned to LMW.

[13] With respect, it is somewhat bizarre so to speak, to arrive at that kind of conclusion when at this stage it is wholly speculative and merely a hypothetical proposition, indeed whether such situation would arise. The question whether LMW could be charged with that resultant conviction and sentence which could cause physical injury on LMW would depend on whether such prosecution is wrongful or malicious when it proceeds based on the alleged false affidavit. One would assume that it is a legal and natural process under the law that where there is a police report lodged in relation to the alleged false affidavit an investigation would be carried out by the authority into this allegation in order to determine the falsity or otherwise of the contents thereof or the averments therein. Accordingly, if the prosecution proceeds on good and reliable evidence which establishes that the facts deposed in the affidavit are true, it cannot be said that LMW would suffer physical injury as this is not wrongful or malicious prosecution. We would assume, therefore, that when the learned judge touches on LMW

being exposed to being charged and sentenced to imprisonment, Her Ladyship meant the case would be based consciously or unconsciously on the alleged false affidavit. It is unthinkable, however, that the Public Prosecutor would charge LMW relying wholly on the alleged false affidavit, hence false evidence. That would be wrong in law. On the other hand, if the investigation reveals that the affidavit is indeed false, the defendants, in particular the third defendant in the instant case, not LMW, are the ones who will be prosecuted for perhaps the offence of perjury. In this regard, it does not escape our attention that LMW has pleaded that on 15 December 2008 he lodged a police report against the third defendant detailing out the alleged lies and falsehood which the third defendant was alleged to have deposed in his affidavit. However, nowhere does LMW plead in the statement of claim that a report on criminal breach of trust has been made against him with the police or any other enforcement agency.

[14] The above discussion admittedly may appear to be bordering on the realm of merits of the case. Much that we do not want to dwell into the merits of the case, we however feel compelled to comment on the learned judge's conclusion on this issue as this seems to be one of the bases for her ruling that sanction of the Director General of Insolvency is not required under s. 38(1)(a) of the Act 360. In our view and with due respect to the learned judge, the conclusion that there could be physical injury occasioned to LMW is not correct and neither is it supported by LMW's statement of claim as it is not pleaded and accordingly does not come within the ambit of the words 'injury to his person' in s. 38(1)(a) of the Act 360.

[15] Turning now to the relevant part of LMW's pleadings, his claim is premised on the alleged conspiracy by the appellant together with the other three defendants in this action to commit an abuse of the court process by filing in court a false affidavit affirmed by the third defendant prejudicial to the interests of LMW and to deceive the court in the Kuala Lumpur Sessions Court Summons No: 54-52-1959-2007 in which LMW is the plaintiff (see para. 15(e) of the statement of claim). Based on his statement of claim, LMW had argued that he did not need the Director General's sanction as his case came within the exception under s. 38(1)(a) of the Act 360. According to him, the suit against the appellant was grounded upon the tort of abuse of process by conspiracy.

[16] For convenience, we set out below the provisions of s. 38(1)(a) of the Act 360:

> 38. Consequence of refusal of discharge
>
> (1) Where a bankrupt has not obtained his discharge -
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

[17] Thus, based on the above provisions, a bankrupt is legally competent to institute any action for damages in respect of an injury to his person without the Director General's previous sanction. However, the exception raises a pertinent question of the type of injury which the expression 'an injury to his person' may encompass. In this regard, if such injury is physical injury to the body of the bankrupt the case is clear cut, he, without doubt, can institute an action for damages without the requisite sanction. But if the bankrupt suffers the injury in mind or mental injury, is such injury included in the expression 'an injury to his person'? In our view, therefore, whether LMW's claim against the appellant falls within the exception in s. 38(1)(a) of the Act 360 will depend very much on the meaning of the words "an injury to his person". Herein lies the difficulty which is brought about by the language of s. 38(1)(a) of the Act 360.

[18] In the case of *K Ismail Ganey Rowther And Company v. M A Abdul Kader, The Official Assignee Of The Property Of K P Peer Mohamed, A Bankrupt* [1932] 1 LNS 31; [1933] 2 MLJ 98, Thorne, Acting CJ "read these words "injury to his person" to be any injury which the bankrupt suffers in mind or body, which might give rise to an action for damages, and which cause of, or chose in action, or right to sue remained in the bankrupt after the bankruptcy."

[19] It is thus clear and unequivocal that the expression "an injury to his person", based on the interpretation in the above case, includes an injury of the mind. However, the expression in question inevitably raises a crucial question for our consideration *viz.*, what is the type or extent of injury of this nature to which an action for damages may be brought and recoverable by a bankrupt. The above case, to begin with, may shed some light on this question wherein the court had stated that from the interpretation of s. 33(i)(a) of the Bankruptcy Enactment, a precursor of the present s. 38(1)(a) of the Act 360, it would appear that in so far as the bankrupt claimed to have a cause of action to recover damages to his reputation, he was entitled to sue without the sanction of the official assignee.

[20] The High Court in *Sharifah Aini Syed Jaafar v. Karangkraf Sdn Bhd* [1989] 2 CLJ 1269; [1989] 2 CLJ (Rep) 467 held that "rights of action relating to a bankrupt's property pass to the official assignee but any right of action arising from injury to a bankrupt person or their reputation does not pass to the official assignee but remains with the bankrupt". In this case the plaintiff sued the defendants for defamation arising out of certain articles published by the defendants in their weekly newspaper. Her action against the defendants was for damages for injury to her reputation. It was held that the plaintiff need not obtain the sanction of the official assignee as she was perfectly entitled to pursue her claim against the defendant in her own personal capacity.

[21] Next, in *Mohd Afsar Yunus v. Handal Utama Sdn Bhd* [1995] 2 CLJ 118, the High Court held that the claim for arrears of salary did not come within the ambit of the words "injury to his person" in s. 38(1)(a) of the Bankruptcy Act 1967, as such the appellant must obtain the sanction of the official assignee before he could bring this action against the respondent. A

[22] LMW had drawn our attention to the case of *Tong Soon Tiong & Ors v. FA Securities Sdn Bhd* [2013] 2 CLJ 448 in support of his argument that he did not require the prior sanction under s. 38(1)(a) of the Act 360. However, the Federal Court in this case dealt with the main issue of the sixth plaintiff's competence to testify in court as a witness when he was adjudicated a bankrupt wherein it was decided that there was no law that prevented a bankrupt from giving any evidence as such he was a competent witness. The examples given by the Federal Court of claims that might come within the exemption in s. 38(1)(a) of Act 360 are merely *obiter* and we find that it does not extend the permissible exception on an injury to person beyond bodily injury and defamation. B C D

[23] In his statement of claim LMW has also pleaded the alleged abuse of the court process by the appellant and three other defendants in order to inflict injury, suffering, fear, anxiety and severe emotional stress implying both an injury to body and mind. We agree with learned counsel for the appellant that the tort of conspiracy of this character does not fall within the exception provided by s. 38(1)(a) of the Act 360. E

[24] The exception in s. 38(1)(a) of the Act 360, in our view, presupposes an action for damages which at law can be recovered or are recoverable, or can be awarded by the court based on an injury to person. Learned counsel for the appellant submitted that injury to the mind refers to cases such as nervous shock. In fact, a claim for nervous shock has been given recognition to the legitimacy at law and in the context of the words "an injury to his person" in s. 38(1)(a) of the Act 360, nervous shock can be said to belong to an injury to the mind which can be relied on as a basis for liability. Thus, a bankrupt may recover damages for nervous shock brought on by injury caused not to him but to a near relative such as his spouse or children. However, the position at common law on claim for nervous shock caused by negligence draws a line where damages may not be recoverable if the case extends beyond the near relative or if the claim for damages is based on grief and sorrow (see for example the House of Lords' decision in *McLoughlin v. O'Brian and Others* [1982] 2 All ER 298) or is based on the fact that the claimant has become frightened, worried or grief stricken. The claimant must show genuine illness or injury (see *Tort Law (5th Edn)* by Catherine Elliott and Frances Quinn at pp. 38 – 39). F G H

[25] Thus, for the purpose of s. 38(1)(a) of the Act 360, where damages cannot be recovered at law even though the action relies on an injury of the mind or mental injury, such claim does not come within the ambit of the I

exception provided therein. In the instant action, it can be seen that LMW's claim is based on tort of conspiracy by the appellant and three other defendants to commit an abuse of the court process. It is thus clear that, under the circumstances of the case, his claim is not based on mental or physical injury pure and simple or as LMW had submitted, on injuries to professional livelihood, credit or reputation and wounded feelings but rather on the abuse of the court process. In any event, to commit an abuse of the court process in order to inflict injury etc, as pleaded by LMW does not necessarily mean he has already suffered mental injury. The claim in s. 38(1)(a) is based on an injury to his person that he actually has suffered. Logically speaking and in law, the claimant has to show or plead genuine illness or injury as the case may be not in the way LMW has pleaded in his statement of claim. Needless for us to say, LMW has also claimed that the defendants and appellant had conspired to commit the abuse of the court process to deceive the court. Obviously, this pleading has absolutely nothing to do with 'an injury to his person'. This case, in our view, is one where the Director General of Insolvency to whom upon receiving and adjudication orders being made the estate of the bankrupt has passed, has to decide whether it is within his right to take the action or give his sanction to LMW to institute or continue with the action.

[26] The words 'an injury to his person' may appear to be wide in its scope of application but the legislative intent of s. 38(1)(a) of the Act 360 does not allow any claim for damages based on the exception to be instituted without any limit. We hasten to say, less it be said we overlook it, that the exception is intended to protect the bankrupt's interest in that in certain situations he can commence an action without the Director General's sanction but on the other hand the legislative scheme of s. 38(1)(a) of the Act 360 primarily is to prevent any action which may adversely affect the bankrupt's creditors hence sanction of the Director General becomes the legal requirement. In other words, the Director General must first be consulted as any action intended by the bankrupt may be detrimental to his creditors (see *Sabah Bank Bhd And Company v. Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 1 LNS 41; [1992] 2 MLJ 588). That explains the reason why upon sanction being given the legal position is that the Director General only intimates his consent to the bankrupt's bringing or continuing an action, he does not divest himself of the property, either real or personal, which is vested in him by the receiving and adjudication orders and revest the property in the bankrupt for the purpose of bringing an action (*K Ismail Ganey Rowther And Company v. M A Abdul Kader, The Official Assignee Of The Property Of K P Peer Mohamed, A Bankrupt*, *supra*). The Director General has to consider the interest of the bankrupt but ultimately at the end of the day he has to ensure that the action of the bankrupt will not be to the detriment of his creditors.

[27] LMW's case is one that we can safely say does not fall within the exception under s. 38(1)(a) of the Act 360. We agree with learned counsel for the appellant that in law, sanction of the Director General of Insolvency

is required under this section for an action based on abuse of court process. The learned judge had obviously erred in law when in her judgment Her Ladyship had gone beyond the ambit of the exception provided for in s. 38(1)(a) of the Act 360 in allowing LMW to proceed with this action without sanction warranting us to intervene. Accordingly, LMW has breached the statutory restriction imposed under s. 38(1)(a) of the Act 360 and as such he ought not to have proceeded with this action for want of sanction.

Single Notice Of Appeal

[28] The argument ventilated before the learned judge by way of a preliminary objection was that the notice of appeal to the judge-in-chambers dated 24 April 2013 was defective and invalid. This ground of appeal though minor it may seem, is worthy of determination. On 18 April 2013 the learned SAR heard three applications namely:

(a) The appellant's application in encl. 46B to set aside the said judgment in default;

(b) LMW's application in encl. 48 for assessment of damages; and

(c) LMW's application in encl. 53 to strike out encl. 46B.

[29] As stated earlier, the application in encl. 46B was allowed while the applications in encls. 48 and 53 were dismissed by the learned SAR. Three orders were extracted from these decisions.

[30] The complaint by learned counsel for the appellant is that the notice of appeal to the judge-in-chambers fails to state which of the decisions of the learned SAR LMW is appealing against. For better appreciation of the issue, the notice of appeal is set out below:

> NOTIS RAYUAN KEPADA HAKIM DALAM KAMAR AMBIL PERHATIAN bahawa Plaintif Lian Meng Wah tidak berpuas hati dengan keseluruhan keputusan Penolong Kanan Pendaftar yang diberikan pada 18 haribulan April, 2013 merayu kepada Hakim Dalam Kamar terhadap keseluruhan keputusan tersebut.
>
> Bertarikh pada 22 haribulan April 2013.
>
> Sgd.
> Lian Meng Wah.

[31] There is no doubt that the notice of appeal does not state the decision in respect of which enclosure LMW is appealing against. Our attention has been drawn to Form 114 of the Rules of Court 2012 which requires the appellant to state in full the order appealed against. LMW ought to have filed three separate notices of appeal as there are three applications and the decisions of the learned SAR are in respect of these applications, not one. Needless to say, when a rule prescribes or requires any step in the proceedings to be taken in a particular manner, parties to the action ought

to take that step in the proceedings in that required manner not in any other manner. There should be full compliance with the rules of procedure and no one should be allowed to sidestep any such rules. The law will be rendered nugatory if parties are allowed to breach the procedure provided for therein without impunity. The court does not condone and will not ignore such breach or non-compliance. But on the other hand, we are mindful of the fact that the law also recognises that where such non-compliance does not occasion a substantial miscarriage of justice to or prejudice the appellant such non-compliance will not render the notice of appeal in this case, though defective, invalid.

[32] From the record of proceedings, it is quite clear that the three applications are inter-related and the learned judge proceeded to consider the three decisions thereof. The appellant should have been consciously aware that LMW could not have proceeded to appeal against any one of the three decisions only, for instance against the decision on encl. 48, without appealing against the decision on encl. 46B and neither could LMW proceed to appeal against the decision on encl. 53 only if he did not appeal against the decision in respect of encl. 46B for obvious reason that if there is no judgment in default of appearance, LMW would not be able to proceed with an assessment of damages in encl. 48 or application in encl. 53. The three decisions are inter-related to one another and under the circumstances, though LMW filed one single appeal, it must without any doubt be in respect of all the three decisions. The non-compliance, in our judgment, does not occasion a substantial miscarriage of justice to or prejudice the appellant in any manner.

Enclosure 46B

[33] The writ of summons and statement of claim were filed on 24 December 2008 and served on the appellant on 21 January 2009. The appellant applied for leave to enter conditional appearance under O. 12 r. 6 of the Rules of the High Court 1980 and to file an application to set aside the service of both documents. The service of the documents was set aside by the learned SAR. LMW subsequently reserved the writ of summons and statement of claim on 24 December 2009. The appellant did not enter appearance. On 19 January 2010, the said judgment in default was obtained against the appellant. On 24 December 2012, the appellant applied to set aside the said judgment in default which was allowed by the learned SAR on 18 April 2013. The learned judge allowed the appeal by LMW and the said judgment in default was reinstated.

[34] Before this court, learned counsel for the appellant contended that the application to set aside the said judgment in default was rightly allowed by the learned SAR. LMW had served the writ of summons and the statement of claim on 24 December 2009 during the court vacation without the leave of the court. Order 18 r. 5 of the Rules of the High Court 1980 applied at

the relevant time as the Rules of Court 2012 only came into operation on 1 August 2012. The old O. 18 r. 5 does not allow the service of pleadings during the court vacation except with the leave of the court or with the consent of all parties to the action. It is to be noted that there is no corresponding provision in the present O. 18 of the Rules of Court 2012 dealing with service of pleadings during the court vacation.

[35] The learned judge in her judgment said that the fourth defendant (the appellant in this appeal) did not rely on this defect in its application to set aside the said judgment in default and the affidavit in support thereof. However, upon scrutiny of these documents, we are satisfied that the appellant clearly relied on this defect in its application before the court below. It follows, therefore, that the finding of the learned judge on this issue is clearly erroneous. Equally erroneous is Her Ladyship's decision that the appellant is precluded from relying on this defect in the service of the writ of summons and statement of claim as a ground in its application to set aside the said judgment in default. It is true, as stated above, that the present O. 18 of the Rules of Court 2012 does not have provisions which correspond with O. 18 r. 5 of the Rules of the High Court 1980 . However, the present Rules of Court 2012 was non-existent at the time the pleadings were served on the appellant on 24 December 2009 and even when the decision to set aside the said judgment in default was made on 18 April 2013. Clearly O. 18 r. 5 of the old Rules of the High Court 1980 applied at that material time. Under the circumstances, the writ of summons and the statement of claim having been served during the court vacation, this court finds that the service thereof was not properly executed and thus defective. Accordingly, the said judgment in default is irregular.

[36] At the outset, we have mentioned that the appellant took almost three years to file its application to set aside the said judgment in default. The learned judge in her judgment found that the appellant had failed to explain the delay on its part in filing the said application. The learned judge went further to state that the said judgment in default was served on the appellant. Perusal of the record of appeal shows a complete absence of any information or record indicating the date of the service of the said judgment. Perhaps that explains the reason why the learned judge while stating that the said judgment in default was served Her Ladyship omitted from mentioning the date of the service thereof.

[37] When an application to set aside a judgment in default is made, it is incumbent upon the applicant to account for the delay and any such application must be made within reasonable time. However, the Supreme Court in *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32; [1989] 1 MLJ 40 held that the court would in a fit and proper case disregard lapse of time. Learned counsel when confronted with this question of delay during the appeal explained that the appellant could not

have filed within the prescribed period in accordance with O. 42 r. 13 of the Rules of Court 2012 as it had not been served with the said judgment. Order 42 r. 13 of the Rules of Court 2012 requires the application to set aside any order to be made and served on the other party within thirty days after the receipt of the order. It is obvious that the prescribed period does not run from the date of the order but the date the appellant is served. Under the circumstances, we accept learned counsel's explanation that the appellant had not been served with the said judgment or at least had not been served earlier. In any event, the delay if any did not occasion a substantial miscarriage of justice or prejudice to LMW and there is no proof that he had taken any significant fresh step in the proceedings after obtaining the said judgment on 19 January 2010 save the filing of the notice of appointment to assess damages (encl. 48) on 24 December 2012 the day the application to set aside the said judgment in default in encl. 46B was filed. In our judgment, this is a fit and proper case where the court is justified in disregarding the lapse of time. We are satisfied that the application was in compliance with O. 2 r. 2(1) of the Rules of Court 2012.

[38] As regards the issue of the alleged failure on the part of the appellant to disclose a defence on the merits to the alleged tort of conspiracy to commit an abuse of the court process, the learned judge had referred to *Bullen and Leake and Jacob's Precedents of Pleadings*, (12th edn) at p. 1203 on the proper defence to be pleaded relating to a charge of abuse of the legal process. A scrutiny of the statement of defence of the appellant discloses that it is consistent with the proper pleading as stated by the learned author in the said book. The appellant has denied LMW's allegations and that according to the learned author is the proper form of defence. The author stresses that if the defence is in the form of a denial the appellant is not required to give particulars of reasonable and probable cause. On the other hand, the onus of proving that the appellant acts without reasonable and probable cause is on the plaintiff. The learned judge had also relied on *Stapeley v. Annets* [1970] 1 WLR 70 CA and *Robert v. Owen* [1980] 6 TLR 172 as authorities in support of her decision that the appellant had to plead reasonable and probable cause to file the impugned affidavit. With due respect to the learned judge, these two cases contrary to what she had said, decided that where the plaintiff had alleged the defendant had acted maliciously and without any reasonable or probable cause and the defendant had denied this charge, it was not the practice to require the defendant to give particulars of his denial. The onus was on the plaintiff to prove his allegation. What can be deduced from these cases is that in a claim for damages on the ground of abuse of legal process, a defence of complete denial suffices. There is no necessity to provide particulars of reasonable and probable cause. These authorities in our view, are not in favour of LMW. The defence, therefore, in substance and effect is not a sham defence. There are merits in the defence of the appellant.

[39] On the necessity to plead defence on the merits in the affidavit in support, we respectfully refer to the Federal Court case of *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1978] 1 LNS 15; [1979] 1 MLJ 123 in the judgment of Raja Azlan Shah Acting CJ wherein His Lordship had said:

> The rule gives the court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits. An appellate court can only interfere with the exercise of the discretion if the court below has clearly acted on some wrong principle, committed some error of law or failed to consider matter which demanded consideration.

[40] Based on the above Federal Court's decision, it is a settled fundamental principle of law that where the judgment in default is regular, an application to set aside the same requires an affidavit in support showing adequate explanation for the default and a *bona fide* defence on the merits asserting credible facts which if proven during trial will constitute a good defence. In the present action, the service of the writ of summons and statement of claim is irregular as it is not in compliance with the mandatory requirement in O. 18 r. 5 of the Rules of the High Court 1980. That being so, the said judgment in default which is obtained subsequently is equally irregular as it is based on the wholly void and defective service of the writ of summons and statement of claim. Before we go any further, it is desirable at this juncture to consider various authorities on the effect of the judgment in default which is obtained in a way not in accordance with the rules applicable to procedure. In *Hamp-Adams v. Hall* (1911) 2 KB 942, it was held that the plaintiff, not having complied with the rule which required the date of service of the writ of summons to be endorsed thereon within three days and the judgment in default of appearance had been signed, was not entitled to proceed by way of default and that the judgment and verdict for damages must therefore be set aside. It was reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule, not as a mere irregularity which could be waived, but as a matter which prevented any further proceedings from being taken on the writ.

[41] The Court of Appeal in the case of *Craig v. Kanssen* (1943) I KB 256 CA, referred to *Daniell's Chancery Practice*, (8th edn,) i, p. 708 wherein the author had stated:

> A judgment obtained by some step not warranted by the rules, or capable of being sanctioned, is wholly void and must be set aside ... In such a case no defence need be shown, but it is otherwise where the court has a discretion as to setting aside ... Where a judgment against a party has been signed irregularly, it is worse than a mere non-compliance with the rules, and he is entitled *ex debito justitiae* to have it set aside ...

[42] In yet another decision, in *Anlaby v. Praetorius* [1888] 20 QBD 764 it was stated that there were good grounds why the judgment in default should be set aside *ex debito justitiae*, because the entry of judgment was a serious matter, leading to the issue of execution. The court has no discretion in a matter concerning a default judgment obtained irregularly and is precluded completely from considering the merits of the defence. Such irregular judgment must be set aside (*Witech Sdn Bhd & Ors v. BHR Group Ltd* [2010] 9 CLJ 288).

[43] The Federal Court's decision in *Tuan Haji Ahmed Abdul Rahman v. Arab- Malaysian Finance Berhad* [1996] 1 CLJ 241 which was followed by the Court of Appeal in *Witech Sdn Bhd*'s case *(supra)* lucidly explained the law on an irregular judgment:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity. The general rule is that when it is clearly demonstrated to the satisfaction of the Court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms.

[44] In the instant appeal, after considering the reasons for the delay in making the application to set aside the said judgment in default and that the requirement under O. 18 r. 5 of the Rules of the High Court 1980 is mandatory as well as the non-compliance in respect thereof, the said irregular judgment in default is in our judgment one that can be described as "worse than a mere non-compliance with the rules." The non-compliance with O. 18 r. 5 of the Rules of the High Court 1980 is not a mere irregularity which can be waived or cured but as a matter which prevents any further proceedings from being taken on the writ of summons and if taken would have the effect of vitiating it. We are of the considered view that the said non-compliance has the effect of vitiating the said judgment in default and to allow such irregular judgment to stand will make it unjust to the appellant. In this regard, the appellant had provided the grounds upon which the said judgment in default should be set aside and that in our view would suffice to set aside the said judgment in default.

[45] In addition, the learned judge had obviously fallen into error when contrary to evidence, her judgment stated that the appellant did not rely on this defect in its application and thus she failed to consider the matter which demanded consideration. Her Ladyship had also acted on wrong principle and committed an error of law when she had failed to consider adequately and apply correctly O. 18 r. 5 of the Rules of the High Court 1980 in relation to the service of pleadings during the court vacation and the correct legal position as regards the issue of the setting aside of judgment in default

obtained irregularly. We are satisfied that under the circumstances of the case, the appellant is entitled *ex debito justitiae* to have the said judgment in default set aside.

[46] There is another issue which has been raised by learned counsel for the appellant in respect of this appeal. The issue is this. The service of the writ of summons and the statement of claim is improper and ought to be set aside because LMW failed to comply with O. 77 r. 3(1) and (3) of the Rules of Court 2012 by failing to give notice in Form 191 to the appellant. In our view, r. 3(1) and (3) must be read together with r. 1 of O. 77. The relevant part of r. 1 which relates to the issue at hand provides for "any two or more persons ... alleged to be liable as partners in respect of a cause of action ... may be sued, in the name of the firm ...". Rule 3(1) uses the word 'partners' and refers to r. 1 while r. 3(3) uses the words 'every person' and refers to r. 3(1). Accordingly all these provisions must be read and construed together. Thus when construed in this manner, these provisions clearly refer to two or more partners not one partner who are alleged to be liable as partners in respect of a cause of action so that where it involves two or more partners they may be sued in the name of the firm but the law requires Form 191 must be given to them in that behalf. Not so as regards the present case. It can be seen that only one partner namely the third defendant is a party to the action. With due respect, learned counsel's argument on this issue is totally misconceived. Under the circumstances the provisions in O. 77 r. 3(1) and (3) have no application to this case. We find no merits in this argument.

Enclosure 48

[47] The next issue to be considered in this appeal is the assessment of damages which is related to encl. 48. It will be remembered earlier in our judgment that LMW filed the notice of appointment to assess damages (encl. 48) on 24 December 2012 almost three years after the said judgment. The learned SAR had on 18 April 2013 dismissed encl. 48 but the learned judge allowed the application and ordered the appellant to pay damages of RM800,000 which according to her was a fair and reasonable amount to LMW as a result of the appellant's tort of abuse of the process of the court committed against LMW. The basis for this decision is that the appellant had failed to affirm an affidavit-in-reply to rebut LMW's claim for damages. Learned counsel for the appellant contended that LMW's affidavit in support was filed without the direction from the learned SAR in accordance with O. 37 of the Rules of Court 2012. In view of this, the appellant did not file its affidavit in reply.

[48] The said judgment in default obtained by LMW on 19 January 2010 amongst others requires the appellant to pay to LMW damages to be assessed as stated in the statement of claim. The procedure relating to assessment of damages is found in O. 37 of the Rules of Court 2012. Under O. 37, the assessment of damages is carried out by the Registrar subject to the provisions of the order while the party entitled to the benefit of the judgment is required

to apply to the Registrar for directions within one month from the date of the judgment. In the instant case, therefore, LMW was required to apply to the Registrar for such directions within one month from 19 January 2010.

[49] In the application for directions the Registrar may give directions as to the time by which a notice of appointment for assessment of damages shall be filed. Once filed, the notice is required to be served not later than seven days from the date of the filing of the same on the party against whom the judgment is given. In addition the notice of appointment for assessment of damages is required to be filed within six months from the date of judgment.

[50] LMW failed to comply with the mandatory requirement in O. 37 r. 1(1) of the Rules of Court 2012 when he did not file for directions of the Registrar within the prescribed period of one month from the date of the said judgment in default. Neither did LMW comply with O. 37 r. 1(3) which requires him to file the notice of appointment for assessment for damages within six months from the date of judgment which is also a mandatory requirement.

[51] In the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149 the Federal Court held that where there is a mandatory prerequisite, that should be complied with and non-compliance rendered the service defective. The court in *Aminah Abas v. Pentadbir Tanah Daerah Kuantan* [2004] 5 CLJ 1; [2003] 4 MLJ 669 and *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2003] 1 MLJ 389 also gave similar interpretation to the word 'shall' which means mandatory and not directory and that the word reflects a measure of mandatoriness in it.

[52] Having considered the circumstances leading to the order made by the learned judge in respect of encl. 48, it would seem clear that there is serious non-compliance with O. 37 on the part of LMW as regards the procedure that is required to be followed relating to assessment of damages. There was indeed no explanation proffered by LMW on the non-compliance with the law and the long delay of almost three years to file the notice of appointment for assessment of damages. In our judgment, the learned judge clearly had erred when she proceeded to assess the damages and decided that the quantum was sufficiently proven relying only on the affidavit of LMW especially when no directions had been given by the learned SAR as required under O. 37 r. 1(1) of the Rules of Court 2012.

Enclosure 53

[53] On encl. 53 the learned judge had admitted in her judgment that her decision was erroneous as there was no longer a necessity to make an order in respect of encl. 53 since she had dismissed encl. 46B and that this court ought to set it aside. However, now that the said judgment is reinstated, it is incumbent on this court to consider encl. 53 on its merits. The application in encl. 53 seeks to strike out the appellant's application in encl. 46B to set

aside the said judgment in default. This court agrees with learned counsel's submission that this application is an abuse of the court process as the Rules of Court 2012 and the old Rules of the High Court 1980 do not provide for an application to strike out an application. LMW should have opposed the application in encl. 46B at the hearing thereof. There is clearly no merit in the application and accordingly the same should be dismissed.

Conclusion

[54] By reasons as aforesaid, we allow this appeal. We set aside the orders of the learned judge and affirm the orders of the learned SAR in respect of encls. 46B, 48 and 53. There is no order as to cost.